CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH

O.A. NO. 2973/2004
MA NO. 2486/2004

New Delhi, this the 18th day of February, 2005

HON'BLE MR. JUSTICE V.S. AGGARWAL, CHAIRMAN
HON'BLE MR. S.A. SINGH, MEMBER (A)

1. Yogender Singh,
995, Sector VIII,
R.K. Puram,
New Delhi.

2. S.C. Sharma,
215-A, Pocket A,
Mayur Vihar Phase-II,
Delhi – 91.

3. R.C. Rana,
Villate & Post Badhal,
Distt. Bagpat, UP.

4. Harbir Singh
s/o Late Sh. Braham Singh,
Shakti Garden, Delhi – 94.

5. Raj Pal Singh,
B-431/3, Meet Nagar,
Delhi – 94.

6. Dalip Singh,
B-185, Delhi Admn. Flats,
Timarpur, Delhi-54.

10

7. Bijendra Singh,
92, Delhi Admn. Flats,
Ashok Vihar Phase IV,
Delhi – 52.

8. Satya Kumar
D-II/121-B Keshav Puram,
Delhi- 110 035.

9. Ashok Kumar,
Flat No. 563,
Azad Hind Cooperative Societies,
Sector –IX, Dawarka,
New Delhi.

10. Karamvir,
H.No. 17, B.D.O. Kothi,
B.D.O. Complex, Alipur,
Delhi – 36.

11. Mishri Lal Yadav,
A-14, Bhagat Singh Park,
Siraspur, Delhi – 42.

12. Somvir Arya,
83, Delhi Administration Flats,
Nimri Colony, Ashok Vihar,
Phase-IV, Delhi – 52.

13. Ram Avtar Gupta
100, South Anarkali Extn.,
Krishna Nagar, Delhi – 51.

14. Suresh Kumar,
281, Delhi Admn. Flats,
Karkardooma, Delhi – 92.

15. Amar Singh Kardam,
1131. Delhi Admn. Flats,
Gulabi Bagh, Delhi – 110 007.

16. Nepal Singh,
D-48, Pocket B,
Mayur Vihar-II,
Delhi – 91. ...Applicants

(By Advocate: Shri R.K. Anand, Senior Counsel with Sh. Devender Singh, Sh. Manoj Ohri, Ms. Shivani Lal and Sh. D.S. Ghanshyam)

-versus-

1. Govt. of NCT of Delhi through
Lt. Governor, Delhi,
Raj Niwas, Delhi.

2. Chief Secretary,
Govt. of NCT of Delhi,
Delhi Secretariat,
5th Floor, I.P. Estate,
New Delhi-110 002.

3. Secretary (Services)
Govt. of NCT of Delhi
Delhi Secretariat,
7th Floor, I.P. Estate,
New Delhi – 110 002.

4. Secretary (Law Justice &
Legislative Affairs)
Govt. of NCT of Delhi,
Delhi Secretariat,
8th Floor, I.P. Estate,
New Delhi. – 110 002. ..Respondents

(By Advocate: Shri George Paracken)

ORDER

Justice V.S. Aggarwal, Chairman:

The applicants, by virtue of the present Original Application, seek a direction to declare the Notification dated 4.12.1980 called Delhi Administration Subordinate Services (5th Amendment) Rules, 1980 (for short DASS) and Notification of 2.11.1992 i.e. Delhi Administration Subordinate Services (Amendment) Rules, 1992, to be illegal, non-est and void ab-initio and to direct the respondents not to disturb the continuance of the applicants in the Organized Feeder Cadre which existed prior to Notification dated 2.11.1992 and to grant them further promotion and seniority in Grade-I DASS.

2. Some of the relevant facts can conveniently be stated to crystallize the question in controversy.

3. In exercise of the powers under Article 309 of the Constitution, the Delhi Administrative Subordinate Service Rules, 1967 (for short, "the Rules") were notified with effect from 10.2.1967. By the said Rules, two services known as executive and ministerial were constituted. As per Rule 2, the service was to have four grades namely, Grade-I, Grade-II, Grade-III and Grade – IV. Rule 6 provides

VSAg

for the method of recruitment to the various grades. Sub-rule (1) to Rule 6 provides:-

> "(1) Recruitment to Grade I : (a) 25% of the vacancies in the grade "shall be filled by direct recruitment in consultation with the Commission. The educational qualifications, age limit etc. shall be such as may be prescribed by the Ministry of Home Affairs from time to time for category III Services, viz., Central Services, Class I and Class II in the rules for the Indian Administrative Service etc. Examination.
>
> (b) 75% of the vacancies in the grade shall be filled by promotion of officers of Grade II having at least five years service in the grade on the basis of merit-cum-seniority on the recommendations of the Departmental Promotion Committee.
>
> (c) The vacancies shall be filled in the following manner:
>
> | | |
> |---|---|
> | Ist vacancy }
2nd vacancy}
3rd vacancy} | By promotion |
> | 4th vacancy | By direct recruitment." |

In the year 1968-69, amendment to said Rules was effected. Clause (bb) was added whereby Stenographers in the grade of Rs. 210-530 were also included as a feeder grade for the purpose of promotion to Grade-I of Ministerial service. In the year 1972, further amendment was made as a result of which clause (bb) was substituted:-

"(a) in sub-rule (i) for clause (bb), the following clause shall be substituted, namely:-

"(bb) Notwithstanding anything contained in sub-clause (b), (i) the Stenographers in the scale of Rs. 210-530 or in the scale of Rs. 210-425 who have been appointed in a regular manner in accordance with the recruitment rules, and have five years regular service in either or both the grades, shall also be eligible to be considered for promotion to Grade-I of the Ministerial Service; and (ii) Technical Assistant, Horticulture Assistant, Plant Protection-cum-Locust Asstt., Horticulture research Assistant, Extension Officer (Agriculture), Seed Development Assistant and Supervisor/Demonstrator in the scale of Rs. 210-425 in the Development Commissioner's Office who have been appointed in a regular manner in accordance with the recruitment rules, and have five years regular service in the grade, shall be eligible to be considered for promotion to Grade-I of the Executive Service.

Provided that the number of posts available for these categories will be in proportion to their respective strength as compared to the number of post in Grade-II (M) to Grade-II (Executive) respectively."

Vide the notification of 4.12.1980, two services known as Ministerial and Executive Services of Delhi Administration Subordinate Service were merged into a single service and hence known as the Subordinate Service of Delhi Administration. By virtue of the amendment effected to the recruitment rules to Grade I now, it

provided that all vacancies in Grade I should be filled by promotion of officers of Grade II having 5 years regular service in the grade on basis of merit-cum-seniority on the recommendations of the Departmental Promotion Committee.

4. In the year 1992, a policy decision was taken by the Delhi Administration that no post of specialized/technical nature in any department shall be included in the feeder channel for promotion to the organized cadre i.e. Delhi Administration Subordinate Service (DASS)/Delhi Andaman Nicobar Islands Civil Service in future. All the secretaries and Heads of the Departments were directed to review the recruitment rules of all such posts and explore the possibility of deleting the same from the feeder channel of the organized cadre. As a result of the said policy decision, the Rules were again modified and amended vide the notification of 2.11.1992. The same reads:-

> "Amendment of rules 6 – In the Delhi Administration Subordinate Service Rules, 1967, in rule 6 under item no. 1 (Recruitment to Grade-I) for existing Clause (b), the following shall be substituted as under:-
>
> "Notwithstanding anything contained in sub-rules (a)/Stenographers in the scale of pay of Rs. 1440-2300 who have been appointed in a regular manner in accordance with the

recruitment rules & have 5 years regular service in the grade shall also be eligible to be considered for promotion to Grade-I of the services on the basis of method of selection prescribed in the Notification F. 3 (75)/79-S-II dated the 4th December, 1980."

As a result of it, technical posts of Development Department were deleted from the feeder channel of Grade-I. As a result of this amendment now, only two categories in the feeder channel for promotion of Grade I DASS are Grade II (DASS) and Stenographers.

5. As a consequence of exclusion of technical cadre from the feeder channel for the Grade-I (DASS), the technical officials in the Development Department were granted promotion in their own department to the higher technical post available in the scale of Rs. 5500-9000/-. Certain representations were made for inclusion of these technical posts once again as a feeder channel for the post of Grade I. As per the applicants in OA No. 2937/2001, the representations made by the private respondents had been rejected. However, on 2.6.2000, an order was issued that 19 employees (private respondent) who belonged to the ex cadre posts were included in the feeder line for promotion to Grade I DASS cadre and were delinked and reverted back to their old positions. They were allowed to be

included in the feeder channel of the organized cadre of Grade I DASS.

The said order reads:-

> "The Hon'ble Lt. Governor is pleased to order that under mentioned 19 employees of Development Department who belong to ex-cadre posts and were included in the feeder line for promotion to Gr. I DASS Cadre vide notifications dated 22.5.72 and were delinked from the same vide notification No. 2(34)/88-S.II dated 2.11.1992, are reverted back to their old position with immediate effect as it existed prior to 2.11.1992.
>
> The above is subject to the condition that this order will not be treated as precedent and no other post of specialized and technical nature in any department shall be allowed to be included in the feeder channel of the organized cadre of Gr.I DASS. No further recruitment will be made against the post vacated by these employees.

Sl.No.	Name of the official & Designation
1.	Sh. Karamvir, TA
2.	Sh. Ashok Kumar, HA
3.	Sh. R.C. Rana, HA
4.	Sh. Harbir Singh, HA
5.	Sh. Rajpal Singh, HA
6.	Sh. Dilip Singh, SI
7.	Sh. Bajendra Singh, PPA
8.	Sh. Satya Kumar, HA
9.	Sh. Yogendra Singh, HA
10.	Sh. S.C. Sharma, HA
11.	Sh. Rajendra Singh, HA
12.	Sh. Mishri Lal Yadav, HA
13.	Sh. Somvir Arya, BO(A)
14.	Sh. Rav Avtar Gupta, HA

15. Sh. Devender Kumar, PPA
16. Sh. Suresh Kumar, HA
17. Sh. Amar Singh Kardam, HA(SC)
18. Sh. Murali Dhar Sharma, EO(A)
19. Sh. Nepal singh, EO(A)(SC)

The above order will cease to be effective after the promotion of above 19 officials as Gr. I (DASS).

Sd/-
(U.R.KAPOOR)
ADDL.SECRETARY(SERVICES)"

Subsequently, on 21.1.2002 in exercise of powers conferred under Article 309 of the Constitution, the abovesaid order dated 2.6.2000 came into being in the form of a notification which is also being challenged and the same reads:

"No. F.55/52/2001/S.I – In exercise of the powers conferred by the proviso to article 309 of the Constitution of India, read with the Govt. of India, Ministry of Home Affairs Notification No. F.27/59-Him(i) dated the 13th July, 1959 and all other powers enabling him in this behalf, the Lt. Governor of the National Capital Territory of Delhi is pleased to make the following rules further to amend the Delhi Administration Subordinate Services Rules, 1967 framed vide notification no. F.3(16)/66-Services dated the 10th February, 1967 as amended from time to time, namely:-

Short title : 1. These rules may be called the Delhi Administration Subordinate

Service (Amendment) Rules, 2002.

Amendment of rule 6: In the Delhi Administration Subordinate Services Rules, 1967, in rule 6, in sub-rule (1), to clause (bb), the following proviso shall be inserted namely:-

"Provided that the 19 officials working on certain ex-cadre posts of Development Department who were included in the feeder line for promotion to the post of Grade I (DASS) vide this Government's NotificationNo.F.10(25)/67-Services-II dated the 19/22 May, 1972 and excluded vide Notification No. F.2(34)/88-S.II dated the 2nd November, 1992, but were otherwise eligible for promotion to Grade-I (DASS) as on 2nd November, 1992 and have been brought back in the feeder channel for promotion vide this Govt.'s order No. F.2(34)/88-S.II/Vol.II/1735-58 dated the 2nd June 2000 shall be promoted to the posts of Grade-I DASS from the date they become eligible for such promotion."

6. Delhi Administration Employees Federation (Regd) and others had filed OAs Nos. 2937/2001 and OA No. 1286/2002. They challenged the order of 2.6.2000 and the Notification of 21.1.2002 assailing the same to be malafide, arbitrary and illegal. The present applicants were arrayed as private respondents. The above said Original Applications were allowed by this Tribunal holding:

> "14. Even the first part of the notification provides that the private respondents who are described as 19 officials working in certain ex-care posts in the Development Department and were excluded vide the notification of 2.11.1992 should be eligible to Grade I DASS. We have already referred to above that the Government order of 2.6.2000 was not a notification issued and should not have much legal force. We do not dispute that the Administrator will have power to exclude or include certain cadre posts from the zone of consideration. The posts on which the private respondents were working were excluded to be considered for promotion in Grade I DASS. If the private respondents were excluded, it was in pursuance of the amendment to Rule 6 of the Delhi Administraton Subordinate Service Rules, 1967. The notification was issued on 2.6.1992. Certain posts, cadres etc. were excluded. Induction of only private respondents, therefore, would not stand scrutiny. Either a cadre or post should have been included in terms of Rule 6 or the same should not be in the zone of consideration. Picking of 19 persons who are private respondents does not appear to be logical conclusion. The decision in the case of L.N.

> Mishra Institute of Economic Development and Social Change (supra) will have little impact in the present case. The reason given that they were otherwise eligible for promotion to Grade I DASS cannot be justified because eligibility is one thing not c0-related with a particular cadre, post or service to be considered for inclusion in the feeder cadre for Grade I DASS. Therefore, we have no hesitation in holding that the impugned order deserves to be quashed.
>
> 15. For these reasons, we allow the present applications and quash the impugned order dated 2.6.2000 and 21.2.2002. No costs."

7. After the decision of this Tribunal, to which we have referred to above, admittedly Civil Writ Petition had been filed in the Delhi High Court against the said decision. It is not in dispute that the Delhi High Court had issued notices but had not granted any stay.

8. In pursuance of the decision of this Tribunal, on 6.9.2004 an order was issued directing the applicants to revert to the Development Commissioner.

9. The applicants, by virtue of the present Original Application, therefore, seek quashing of the said order, besides what we have referred to above.

10. The main argument advanced on behalf of the applicants has been that the impugned Notifications particularly of 2.11.1992 is void because the same had been issued against the Rules as the Union Public Service Commission has not been consulted. The fact that Union Public Service commission had not been consulted was not disputed on behalf of the respondents. However, the respondents' learned counsel contended that applicants are debarred from taking the said plea for the reason that in the earlier Original Applications, to which we have referred to above, the present applicants had been arrayed as parties and they were supporting the said Notification to be valid. He further urged that the applicants could have raised this plea in the earlier litigation and, therefore, the present plea is barred by the principle of constructive resjudicata.

11. At this stage, to keep the record straight, it would be appropriate to mention that when the Original Application was filed on 14.12.2004, this Tribunal had stayed the operation of the order of 6.9.2004 till the next date of hearing. The respondents prayed for vacation of the said stay order. They had filed a short reply. On 17.01.2005, when this matter came up for hearing as to whether the

interim order has to be vacated or not, it had been recorded:

> "The respondents are seeking vacation of interim order granted by this Tribunal on 14.12.2004
>
> It was pointed to the parties that on basis of the material if the matter could be argued on merits of the same, it was stated that OA can be disposed of on its merit rather than we pass any interim order. In fact, it is appropriate to do so. It is directed that it be listed on 28.01.2005 list in the regular list for arguments.
>
> Interim order in terms of earlier order to continue. It is made that any benefit that has accrued would be subject to the final decision of the OA."

12. It is in pursuance of this order that parties had been allowed to make their submissions keeping in view the interest of justice and to avoid delay rather than **come to** the technical pleas, which must be pleaded.

13. Reverting back to the first aspect of the matter, as to if the application is barred by the principle of constructive resjudicata, it has to be stated, at the outset, that under Section 22 of the Administrative Tribunals Act, this Tribunal is not bound by the procedure prescribed under the Code of Civil Procedure. It is guided

by the principles of natural justice, subject to other provisions of the Act and the Rules that have been framed. However, the principles of constructive resjudicata are also based on principles of fair play and natural justice. The doctrine of resjudicata has been recognized with respect to the Rule of conclusiveness of judgment that there should be end of law suits and that no man should be waxed twice over the same cause. The doctrine of resjudicata and constructive resjudicata predominantly is based on the principle of equity, conscience and justice. It would neither be equitable nor fair nor in accordance with principles of natural justice when issues, which ought to have been raised in the earlier suit but did not raise, are allowed to be raised in the subsequent litigation. Therefore, we find that there is nothing illegal if the same principles are considered as enshrined under explanation IV of Section 11 of the Code of Civil Procedure. The same reads:

> **"Explanation IV –** Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

14. With this backdrop, we revert to consider whether in the facts of the case, the principle of constructive resjudicata in the present case, can be made applicable or not. This is for the reason that as we have already referred to above in paragraph 14 of the earlier order, to which we have already referred to above, the Notification, which is now being challenged, it had been taken note of. As in the facts we have noticed, this was the basis on which the whole controversy had arisen. In that litigation, the present applicants, who were private respondents, did not care to challenge the validity of the Notification of 2.11.1992. They simply pleaded that certain facts were not noticed in the Notification of 2.11.1992, which were rectified by the subsequent Notification of the year 2000. In fact, it was pleaded that Notification of 1992 was without concurrence of Union Public Service Commission. If that can be held valid, there was no reason as to why subsequent Notification should not be held valid. In other words, specifically they omitted to take any plea that Notification of the year 1992 was invalid.

15. In the case of ***State of Orissa & Ors. vs. Janamohan Das and etc. etc.***, AIR 1993 (Orissa) 180, this question had been considered and the Orissa High Court held that when a question was not raised in the previous litigation, the same would be barred by the

principle of constructive resjudicata in the subsequent litigation. Another Single Bench of the same High Court in the case of ***Krushna Prashad Misra and Others vs Panchanan Misra and Ors.***, AIR 1997 (Orissa) 120, considered the same controversy. Earlier there was a suit for partition of joint family property. In it, plaintiff in subsequent suit for partition of certain property had opportunity to press that property in question was joint family property. A plea was taken that suit was not maintainable but was not pressed. It was held that the earlier decision would operate as res judicata and second suit was not maintainable. The same principle would be applicable in the facts of the present case. The applicants, who were respondents in the earlier litigation, had the opportunity to assail the Notification of the year 1992 but they did not do so. Thus, that decision, when the earlier decision had been made final, cannot be made subject matter of the controversy and principles of constructive res judicata necessarily would apply.

16. The basic principle of constructive res judicata has simply been explained by the Supreme Court in the case of ***Amalgamated Coalfields Ltd. & another vs. Janapada Sabha Chhindwara & Ors.***, AIR 1964 SC 1013. The Supreme Court held that constructive

res judicata, which is a special and artificial form of res judicata enacted by S.11 of the Civil Procedure Code, should not generally be applied to writ petitions but this principle can be made applicable where Courts are dealing with cases where the impugned tax liability is for different years. It was only in view of the tax liability that the Supreme Court did not deem it appropriate to attract the said principle, but it was finally held that general principles of res judicata apply to writ petitions filed under Article 32 or even Article 226 of the Constitution.

17. We refer with advantage to the case of ***Madhavkrishna & another vs. Chandra Bhaga and Others,*** 1997 (2) SCC 203. In the said case, in a suit of partition for a house, a decree was passed that a person was exclusive owner of the property and it was not a joint family property and that respondents had no right to partition. The decree became final. The said person, during his lifetime, had executed a registered Will. After his death, a suit was filed by Madhavkrishna & Anr., who were appellants before the Supreme Court. In the further litigation before the High Court, the respondents cannot plead their title of the property. The Supreme Court held that the principles of constructive res judicata would operate.

18. In fact, the Supreme Court in the case of ***Ferro Alloys Corpn. Ltd. & Another vs. Union of India & Ors.,*** AIR 1999 (SCC) 1236, further held that the principle of res judicata would be applicable to co-defendants. They are required to take the necessary defence and pleas. Otherwise principle of constructive res judicata would be applicable. The findings are:

> "29. It is no doubt true that principle of constructive res judicata can be invoked even inter se Respondents, but it is well settled that before any plea by contesting Respondents could be said to be barred by constructive res judicata in future proceedings inter se such contesting Respondents, it must be shown that such a plea was required to be raised by the contesting Respondents to meet the claim of the appellant in such proceedings. If such a plea is not required to be raised by the contesting Respondents with a view to successfully meet the case of the appellant, then such a plea inter se contesting Respondents would remain in the domain of an independent proceedings giving an entirely different cause of action inter se the contesting Respondents with which the appellants would not be concerned. Such pleas based on independent causes of action inter se Respondents cannot be said to be barred by constructive res judicata in the earlier proceedings where the lis is between the appellants on the one hand and all the contesting Respondents on the other. In other words, when the appellants are not concerned with the inter se disputes between the

> contesting Respondents such inter se disputes amongst Respondents would not give rise to a situation wherein it can be said that such contesting Respondents might and ought to have raised such a ground of defence or attack for decision of the Court....."

19. Almost identical was the view expressed in the case ***Konda Lakshmana Bapuji vs. Govt. of Andhra Pradesh & Ors.*** AIR 2002(SC) 1012. The findings are being reproduced below for the sake of facility:

> "23.....In substance, Section 11 bars a Court from trying any suit in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties in a Court and has been heard and finally decided bysuch Court which is competent to try such subsequent suit or the suit in which such issue has been subsequently raised. Eight Explanations are appended to it. We are concerned with Explanation IV which embodies the principle of constructive res judicata and says that any matter which `might and ought' to have been made a ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit. A conjoint reading of Section 11 and Explanation IV shows that if a plea which might and ought to have been taken in the earlier suit, shall be deemed to have been taken and decided against the person raising the plea in the subsequent suit."

20. At this stage, it would be appropriate, therefore, to sum up the above said conclusions. Where the constructive res judicata is a special and artificial form of resjudicata, it is a technical aspect but basis on which said rule rests is founded on consideration of public policy. It is not possible to have any hard and fast rule on the question but it depends on the facts and circumstances of the case. However, one important aspect is that if a matter could have been set up as a ground of defence in the former suit and if its introduction into that suit was necessary for a complete and final decision, it will be deemed in the subsequent suit to have been decided and principle of constructive res judicata would apply. There is no distinction made between a claim or defence actually made or which might and ought to have been made. By fiction of law the latter also is deemed to have been directly and substantially in issue in the former suit.

21. Reverting back to the facts of the present case, we have already noticed above that this question should have been raised in the earlier litigation but was not raised. At that time, the applicants did not deem it appropriate to challenge the Notification of the year 1992. In fact they supported it. It could have been raised in the previous litigation and once it is not raised, the principle of constructive res judicata

squarely applies to the facts of the case. Therefore, it is too late in the day for the applicants to rake up this plea.

22. In view of the findings recorded above, it is not necessary for this Tribunal to express itself on the question of validity of the Notification in which Union Public Service Commission has not been consulted.

23. For these reasons, Original Application, being without merit, must fail and is dismissed.

(S.A.Singh)
Member (A)

(V.S.Aggarwal)
Chairman

/na/